90-1714

Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REGIONAL AIRLINE PILOT ASSOCIATION
and JAMES BISHOP,
Petitioners

v.

WINGS WEST AIRLINES, INC. dba
AMERICAN EAGLE

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Railway Labor Act give a district court the power to enjoin an employer's unilateral change of working conditions after a union has been certified as the representative of the appropriate class of employees of a carrier but before the first agreement has been reached in order to enforce the bargaining obligation created by the Railway Labor Act?

LIST OF PARTIES

The parties to the proceedings below, and before this Court are:

1. Regional Airline Pilot Association
2. James Bishop
3. Wings West Airlines, Inc. d/b/a American Eagle

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PETITION FOR WRIT OF CERTIORARI

Petitioners Regional Airline Pilot Association and James Bishop pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on October 9, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 915 F.2d 1339 and is printed as Appendix A. The Order of the United States District Court for the Northern District of California is unreported and is printed as Appendix B. That court's Order Denying Motion to Vacate is unreported and is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 9, 1990. A timely petition for rehearing and suggestion for a rehearing en banc was denied on January 9, 1991. The court's order is reprinted as Appendix D. Justice O'Connor signed an order extending the time for filing a petition for writ of certiorari to and including May 9, 1991. A copy of that order is printed as Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the Railway Labor Act 45 U.S.C. §§ 151, et seq. are printed as Appendix F.

STATEMENT OF THE CASE

On September 13, 1988 The National Mediation Board certified the Regional Airline Pilot Assocation (RAPA) as the designated collective bargaining representative of the pilots of Wings West Airlines Inc. dba American Eagle. In the First Amended Complaint For Damages and Injunctive Relief under the Railway Labor Act (RLA), RAPA [1] alleged that Wings West made significant changes to the terms of and conditions of employment of the pilots by withdrawing certain travel pass benefits which the pilots had previously enjoyed. The First Amended Complaint alleged that this unilateral change in working conditions "was done without bargaining with the certified representative, and without exerting every reasonable effort to make an agreement concerning working conditions, without considering the dispute in conference, without settling the dispute in order to avoid any interruption of commerce, and furthermore was done in order to interfere with the right of the

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[1] Petitioners are the labor organization and its President, James Bishop. For convenience they will be referred to jointly as RAPA.

pilots to organize and bargain collectively through representatives of their own choosing."

The Petitioners claimed that this unilateral change without bargaining violated four provisions of the Railway Labor Act, *viz.*, 45 U.S.C. § 152 First, Second, Third and Fourth. On the carrier's motion to dismiss, the district court granted the motion holding that the dispute was "a 'minor dispute' relating to the interpretation or application of the existing collective bargaining agreement." App. B pp. 1a-12a. On petitioners' motion to vacate, the district court reaffirmed its view that a minor dispute existed notwithstanding the fact that both parties "argue[d] that this cannot be a minor dispute." App. C p. 14a.

On appeal the court below rejected the district court's view that a "minor dispute" existed. Rather, after noting that under the National Labor Relations Act "such a change in working conditions by an employer before the bargaining process began would be an unfair labor practice to be remedied by the NLRB; *see NLRB v. Katz*, 369 U.S. 736 (1962)" 915 F.2d at 1402; it held that the Railway Labor Act does not impose the same obligation. The court held that the Railway Labor Act, although authorizing the courts to "assure the implementation of section 2, First through Fourth, in order to carry out the congressional intent," 915 F.2d at 1402, did not apply "where there has been no negotiation process instituted at all." *Id.* at 1403. This holding was supported by the court's view that the authority of the courts under the Railway Labor Act to grant injunctive relief is precluded unless "steps toward bargaining, mediation, or the other steps provided in the Act to assist bargaining process have been undertaken." *Id.* at 1403.[2]

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[2] In the Petition for Rehearing and Petition for Hearing en banc, petitioners asked that the court remand to the district court to permit them to allege that within the brief period between the certification (September 13) and the unilateral changes (September

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF THE REASONS THIS PETITION SHOULD BE GRANTED

The structure of the Railway Labor Act is built upon a system of maintaining the status quo for oftentimes long periods of time while the parties attempt to work out a collective bargaining agreement. The status quo means that the carrier may not change working conditions and the labor organization may not strike. The entire status quo scheme has one area of unresolved conflict and that occurs after a labor organization is certified as the representative of a class or craft of employees and before the first agreement is reached by the parties. Since 1988 three circuits have faced this question and rendered conflicting and confused answers to the question of the extent to which a court may enjoin a carrier's unilateral changes. In addition to the court below in this case, most recently the Eleventh Circuit has ruled on this issue. See, *International Ass'n of Machinists v. Transportes Aeroes Mercantiles Pan American a/k/a Tampa Airlines*, 924 F.2d 1005 (11th Cir. 1991). Three years earlier the D.C. Circuit faced this issue in *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir. 1988), amended, 848 F.2d 232, *cert. denied*, 488 U.S. 820 (1988). The court below and the D.C. Circuit held that the court could not enjoin such unilateral changes. The Eleventh Circuit disagreed.

This conflict, as we shall show, arises because of a 1942 case, *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942) which each of the circuit courts noted above has either narrowed considerably or disregarded substantially in light of intervening decisions of this Court. Moreover, the efforts of the circuit courts to avoid the

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29, 1988), the union had "contacted the carrier and was in the process of arranging the first negotiation session." (Pet. for Reh. p. 10).

Williams regime have led to an absurd result. These cases have created a regime whereby carriers are *encouraged* to make unilateral changes during the narrow window between certification and bargaining and similarly labor organizations are free to strike before bargaining and the other statutory processes begin, but not after!

II. THE STATUS QUO DOCTRINE UNDER THE RAILWAY LABOR ACT AND THE *WILLIAMS* DOCTRINE

The Railway Labor Act establishes an elaborate statutory mechanism for resolving disputes in the railway and airline industries without the disruption to commerce caused by a resort to self-help measures by carriers making unilateral changes or by unions engaging in strikes. See, *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142 (1969). In Section 2, Ninth, Congress designated the National Mediation Board as the agency to resolve disputes over whether a union shall represent a particular "craft or class" of employees and to "certify" the designated union as the authorized collective bargaining representatives.[3] Section 2, Ninth of the Act mandates that "[u]pon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class." Section 2, First, requires the employer to "exert every reasonable effort to make and maintain agreements concerning . . . working conditions" with the certified representative.

The statutory process is supported by three explicit "status quo" provisions which forbid unilateral action by *either party* prior to exhaustion of the procedures of the Act. Section 5, First, 45 U.S.C. § 155, First (no unilateral changes over disputes subject to NMB resolution);

[3] The NMB's jurisdiction over representation disputes has long been recognized as exclusive. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943).

Section 6, 45 U.S.C. 156 (no unilateral changes after notice to amend) and Section 10, 45 U.S.C. § 160 (no unilateral change where Emergency Board established). Additionally this Court has recognized an implicit status quo obligation in the duty to "exert every reasonable effort" to make agreements imposed by Section 2, First. *Detroit & Toledo Shore Line, supra*, 396 U.S. at 151.

Williams stands as the only contrary instance where the status quo obligation is not recognized by this Court. *Williams* turns on two principles that have been subsequently rejected by this Court. In *Williams*, the Court held that an employer was permitted, while bargaining with a union, to deal directly with employees and to establish individual contracts of employment with them. This conclusion provided the basis for the second rule of law articulated in *Williams* which has created the conflict in the circuits: namely that the Railway Labor Act does not preclude an employer from making unilateral changes in working conditions while the parties are bargaining and before the parties arrive at a complete agreement.

The first proposition which is the underpinning of the second proposition was decisively rejected two years later. In *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court held that an employer undermined and defeated the purposes of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (NLRA) by dealing directly with individual employees who are represented by a union. This Court concurrently applied this principle to employers covered by the RLA. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944).

Williams arose when the employer made changes in the wages of employees who were then represented by a union but before a collective bargaining agreement was completed. The *Detroit & Toledo Shore Line* case arose when the carrier announced a unilateral change in work assignments while the parties were exhausting the Act's media-

tion procedures. The question presented to the Court was whether unilateral changes in matters not covered by the parties' collective bargaining agreement, like unilateral changes in working conditions prohibited by Section 6 of the Act, were prohibited.[4] This Court held that the term "agreements" as used in the statute encompasses not merely the provisions reduced to writing but the totality of "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to the dispute.' 396 U.S. at 153. This Court took careful pains to question-although not expressly overrule-the conclusion in *Williams* that the status quo requirements of Section 6 were applicable only to "changes in agreements." *Id.* at 158.

Two years later this Court's decision in *Chicago & Northwestern Ry Co. v. United Transportation Union*, 402 U.S. 570 (1971) signalled a further erosion of the *Williams* principle. In that case, the union had exhausted the Act's procedures for negotiation and mediation and was prepared to use the self-help measure of a strike. The carrier sought an injunction on the basis that Section 2, First, required the union to continue to exert every reasonable effort to make an agreement rather than resorting to self-help. The Court agreed that unilateral action could be judicially enjoined to encourage full compliance with the duty to bargain.

Drawn from these cases is a simple proposition: Although *Williams* held almost 50 years ago that an employer could make unilateral changes in working conditions even though there was a bargaining representative

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[4] The procedures of Section 6, 45 U.S.C. § 156 apply only where parties give "written notice of an intended change in agreements affecting rates of pay, rules, or working conditions . . ." Since the Section 6 notice is limited to change in agreements, it is not applicable to this case.

that principle has been severely weakened if not rejected by intervening decisions of this Court.[5]

III. THE CONFLICT IN THE COURTS OF APPEALS ARISES OVER A DISPUTE WITH RESPECT TO THE POWER GRANTED TO THE COURTS UNDER THE RLA TO ENJOIN UNILATERAL CHANGES

The first court to consider this issue,[6] *International Ass'n of Machinists v. Trans World Airlines, supra*, recognized that "the *Williams* case holding, though weakened, is not dead . . . [and therefore no district court has the] power to enjoin unilateral changes in working conditions [based on] Section 6." 839 F.2d at 814. It however found such a power under Section 2, First, albeit a very limited power which could not be exercised "absent a showing of unavailability or ineffectiveness of other remedies." *Id.* at 815.

The court below followed a somewhat different course. First, it held that courts do have the jurisdiction to enforce Section 2, First through Fourth in contrast to the D.C. Circuit. 915 F.2d at 1403. However it held that no such injunction could issue, in agreement with the D.C. Circuit where "no steps toward bargaining, mediation, or the other steps provided in the Act to assist the bargaining process have been undertaken." *Id.*

The Eleventh Circuit's more recent opinion in *International Ass'n of Machinists v. Tampa Airlines, supra*, takes a broader and conflicting view of the power of a court to enforce the status quo obligation created by Sec-

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[5] Each of the three circuits has recognized that the *Williams* doctrine is "weakened", *International Ass'n of Machinists v. Trans World Airlines*, 839 F.2d at 814, "limited" and "narrowed", *International Ass'n of Machinists v. Tampa Airlines*, 924 F.2d at 1008 and 1009; and "weakening of that strict proscription", *Regional Airline Pilots v. Wings West Airlines*, 915 F.2d at 1403.

[6] No court had been previously asked to narrow or challenge the *Williams* rule.

tion 2, First. The court held "that Tampa Airlines violated the RLA's duty to bargain in good faith when it unilaterally changed existing working conditions after collective bargaining negotiations with IAM had begun." 924 F.2d at 1010.[7]

The court specifically rejected the view "that an injunction cannot issue until all RLA procedures have been exhausted" *Id.* at 1010. In doing so the court rejected the "language [of *IAM v. Trans World Airlines* and *Regional Airline Pilots Ass'n v. Wings West*] which might be interpreted as supporting Tampa Airlines' position that an injunction [was foreclosed until the RLA procedures were exhausted." *Id.* Thus the Eleventh Circuit has squarely rejected the limitation on injunctive relief advanced by the D.C. Circuit and the Ninth Circuit that all procedures under the RLA must be exhausted before injunctive relief is appropriate.

Additionally, the Eleventh Circuit has unequivocally held that Section 2, First, establishes a status quo obligation coextensive with that established under the National Labor Relations Act. In contradistinction, the D.C. Circuit and the Ninth Circuit have refused to apply the same doctrine expressing reluctance to run afoul of the continued presence of *Williams*. The Eleventh Circuit's adoption of the NLRA's status quo doctrine was founded upon this Court decisions which were decided after *Williams*:

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[7] In *Tampa Airlines*, the IAM had been certified and negotiations had commenced when the carrier's refusal to bargain consisting of various unilateral changes occurred. The court held that the status quo was defined by "the prior, unratified agreement [between Tampa Airlines and the ousted union]", 924 F.2d at 1009. The court noted that *Williams* could be distinguished because the status quo could be defined by this unratified agreement. There is no meaningful difference between the status quo as defined by the employer's practices and policies and an agreement which was neither agreed to nor ratified by a predecessor union which has been ousted.

> "As [this Court] noted in *Chicago & North Western* . . . the RLA's and the NLRA's duty to bargain in good faith are based on the same underlying policy:existing rates of pay, rules, and working conditions must be maintained during negotiations because '[t]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition' of the union as the bargaining representative". *Id.* at 1010.

There is no reason expressed in the opinion below why the RLA bargaining obligation should be treated any differently other than to note the obvious that the RLA "does not provide for such an agency [as the NLRB]." 915 F.2d at 1402.

The Eleventh Circuit attempted to avoid a direct conflict with *Williams*[8] by reading it to be limited to the narrow situation where there is 'absolutely no prior history of any collective bargaining *or* agreement between the parties on any matter." 924 F.2d at 1008. This reading gives *Williams* "a small window of remaining vitality." *Id.* at 1009 (fn omitted). The court below rejected the view that the *Williams* window of vitality is so narrow and held in agreement "with the D.C. Circuit that the interjection of the federal courts in the bargaining process is not authorized by section 2, First . . ." 915 F.2d at 1403.

This analysis leads to an absurdity. It leaves carriers free to make unilateral changes during that brief period between when the National Mediation Board issues a certification and bargaining actually begins. It likewise leaves the union free to strike so long as it does so before bargaining. Thus there is a "rush" to either make unilateral changes or to strike before bargaining. No regime could be more foreign to the entire status quo pro-

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[8] Ironically the unilateral changes in *Williams* were made when the carrier and the union were negotiating.

cedures of the Railway Labor Act. Worse yet this scheme encourages carriers to delay bargaining to effect changes, and unions, that are so inclined, to delay bargaining while they undertake strike activity. Thus the carrier and the union are encouraged to avoid bargaining to achieve their ends!

IV. THE NLRA IMPOSES A DUTY TO MAKE NO UNILATERAL CHANGES FROM THE MOMENT OF CERTIFICATION, AND THE RLA COMPELS THE SAME RESULT

This Court has "observed in the past that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA." *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. —— at (1989). With this in mind we turn to the NLRA doctrines.

In *NLRB v. Katz, supra*, this Court held "that an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5) [29 U.S.C. § 158(a)(5)], for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) as much as does a flat refusal." 369 U.S. at 748. See also, *NLRB v. C. & C Plywood Corp.*, 385 U.S. 421 (1967) (violation to make unilateral change during life of collective bargaining agreement) and *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988) (recognizing violation to make unilateral change after contract has expired while negotiations preceding).[9]

It is also uncontested that the unilateral change doctrine applies from the date the union is certified under the provisions of the NLRA. In fact the employer acts

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[9] This Court has pending an aspect of the unilateral change doctrine in *Litton Financial Printing Division v. NLRB*, No. 90-285 (argued March 20, 1991).

at its peril in making any unilateral changes from the date of the election:

> "The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the verification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending". *Mike O'Connor Chevrolet-Buick GMC Co., Inc.*, 209 NLRB 701, 703 (1974), enforcement denied on other grounds, 512 F. 2d 684 (8th Cir. 1975).

The RLA likewise imposes an equivalent obligation:

> "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for purposes of this chapter." 45 U.S.C. § 152, Ninth

Only, as we have shown above, the lingering effects of *Williams* interfere with the enforcement of this statutory command.

V. THIS COURT'S *WILLIAMS* DOCTRINE HAS BEEN EFFECTIVELY DISCARDED

The three circuit courts of appeals which have faced this issue have recognized the moribund nature of the *Williams* doctrine. They have however explicitly disagreed upon the extent to which the status quo obligation may be enforced. The question is of importance for the rule of law that will govern action by both carriers and unions

after a union is chosen as the representative of the appropriate class or craft and until any initial agreement is achieved. The issue deserves plenary review by the Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15335

D.C. No. CV-88-3487-FMS

OPINION

THE REGIONAL AIRLINE PILOTS ASSOCIATION; JAMES BISHOP,
Plaintiffs-Appellants,

v.

WINGS WEST AIRLINES, INC., dba AMERICAN EAGLE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
April 20, 1990—San Francisco, California

Filed October 9, 1990

Before: Procter Hug, Jr. and Mary M. Schroeder,
Circuit Judges, and James A. von der Heydt,*
District Judge.

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* The Honorable James A. von der Heydt, Senior United States District Judge for the District of Alaska, sitting by designation.

COUNSEL

David A. Rosenfeld, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, California, for the plaintiffs-appellants.

Alexander P. Madar, Forth Worth, Texas; Barbara S. de Oddone, Littler, Mendelson, Fastiff & Vichy, San Francisco, California, for the defendant-appellee.

OPINION

HUG, Circuit Judge:

The central issue in this case is whether the airlines' unilateral change in working conditions, immediately after the union's certification as representative of the airlines' employees but before the collective bargaining process had begun, was a violation of section 2, First through Fourth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152. First through Fourth (1982). The change in working conditions involved a change in travel pass privileges. The district court held that because this was a "minor dispute" to which the arbitration provisions of the RLA applied, it lacked jurisdiction to consider the matter. We hold that there is federal court jurisdiction to consider the application of section 2, First through Fourth, but affirm on the basis that the complaint fails to state a claim for relief.

I. *Facts*

Wings West is an airline carrier within the meaning of section 1, First of the RLA, 45 U.S.C. § 151, First. Regional Airline Pilots Association ("RAPA") is a labor union, certified on September 13, 1988 by the National Mediation Board as the representative of the Wings West pilots.

RAPA and one of its members, pilot James Bishop, alleged in the First Amended Complaint that during the

period when the National Mediation Board was conducting an election to determine whether RAPA would represent the pilots, Wings West, "failed and refused to provide pilots" certain travel benefits which had been previously promised.[1] Specifically, the complaint alleged that Wings West had promised to provide pilots a "D-2 Annual Pass Card," but that Wings West failed to provide the D-2 passes in order to induce the pilots not to join, organized, assist in organizing, or remain members of RAPA, and that this was in violation of provisions of the RLA. *See* 45 U.S.C. § 151, Fourth.

The second part of the complaint concerned conduct occurring after RAPA was certified as the union. The complaint alleged that on September 29, sixteen days after RAPA's certification, Wings West withdrew certain other pass privileges, which had previously been given to the pilots. The complaint alleged that the changes were:

> done without bargaining with a certified representative, and without exerting every reasonable possible effort to make an agreement concerning working conditions, without considering the dispute in conference, . . . [the changes were made] in order to interfere with the rights of pilots to organize and bargain collectively through representatives.

The complaint alleged that withdrawing the pass benefits was a violation of section 2, First, Second, Third and Fourth of the RLA.

Overall, RAPA's complaint sought damages for the denial of the D-2 passes prior to certification and injunctive relief to restore those benefits withdrawn on September 29, after certification, as well as damages for the withdrawal of those benefits.

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[1] With respect to Bishop, the complaint was brought as a class action and RAPA brought the action in a representative capacity on behalf of the pilots.

The district court granted summary judgment in favor of Wings West on the grounds that it lacked jurisdiction because the dispute at issue was either a "minor dispute" or a "representational dispute."

II. *Minor Dispute*

After reviewing the First Amended Complaint on its merits, the district court held that the dispute was properly classified as a minor dispute, over which the National Mediation Board has exclusive jurisdiction.

The Supreme Court recently held that when determining if a dispute is minor,

> [one] looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing agreement.

Consolidated Rail Corp. v. Ry. Labor Exec. Ass'n, 109 S. Ct. 2477, 2481 (1989). *See also Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 722-23 (1945) (minor disputes are controversies which involve the application or interpretation of an existing collective bargaining agreement); *Switchmen's Union of N. Am. v. Southern Pac. Co.*, 398 F.2d 443, 447 (9th Cir. 1968) ("where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, . . . the question . . . involves a minor dispute").

Here, no agreement existed, or had ever existed, so the dispute could not be "conclusively resolved by interpreting th existing agreement." Therefore, we find that the district court erroneously labeled the dispute as a minor dispute.

III. *Representational Dispute*

The district court alternatively found that it lacked jurisdiction because the dispute was representational.

Both parties agreed at oral argument that because RAPA was certified by the Board on September 13, 1988, RAPA's claims of interference and discrimination during the representational election became moot upon RAPA's certification.

IV. *Section 2, First and Second*

RAPA contends that the change in pass benefits after September 19 was a violation of section 2, First and Second because Wings West did not use the bargaining process and, in fact, distorted the bargaining process by a pre-bargaining reduction in benefits. Wings West, on the other hand, contends that since no collective bargaining agreement had ever been in effect, it was entitled to exercise its managemnt prerogative of changing working conditions and that the district court lacked jurisdiction to interfere with these changes.

Wings West notes that section 6 of the RLA, 45 U.S.C. § 156, does contain a specific prohibition against the carriers changing the status quo with regard to pay and working conditions pending completion of the bargaining process. However, it observes that this section, by its terms, only applies to situations when a collective bargaining agreement is in effect and the carrier intends to make the change at the termination of the agreemnt.[2] *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 158 (1969); *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 400 (1942).

RAPA acknowledges that section 6 does not apply. However, RAPA still contends that the statutory mandate of section 2, First and Second of the RLA requires

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[2] Section 6 of the RLA, 45 U.S.C. § 156, reads:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of the conference between the representatives of the parties . . . .

a carrier to resort to the bargaining process before instituting unilateral changes.

The RLA, section 2, First and Second, states:

> First. Duty of carriers and employees to settle disputes.
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> Second. Consideration of disputes by representatives
>
> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

RAPA asserts that the federal courts have jurisdiction to enforce these sections and that it is contrary to the spirit of these provisions to permit unilateral changes before the bargaining starts. Thus, RAPA contends that it is within the jurisdiction of the federal courts to prevent such activity by the carrier, as being disruptive of the bargaining process. It is clear that under the National Labor Relations Act ("NLRA") such a unilateral change in working conditions by an employer before the bargaining process began would be an unfair labor practice to be remedied by the NLRB. *See NLRB v. Katz*, 369 U.S. 736 (1962). However, we must be careful in transposing concepts from the NLRA to its predecessor, the RLA.

In the NLRA, an administrative agency is provided that develops expertise in overseeing this bargaining proc-

ess with the authority to issue orders enforceable by the federal courts to rectify unfair practices. The RLA, on the other hand, does not provide for such an agency. The Mediation Board is not such an agency. Its designated function is to mediate and not to order one party or the other to take or decrease from action. *See Airline Pilots Ass'n, Int'l v. Transamerica Airlines, Inc.*, 817 F.2d 510, 513 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987). Even in the one designated area of jurisdictional disputes, in which the Board is authorized to make a final decision, Congress took special precautions to allow appointment of a separate committee to make decisions on certification so as not to jeopardize the Board's primary function as a neutral in the mediation process. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 580-81 (1971) (citing S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3).

We find that the federal courts definitely have the authority to assure the implementation of section 2, First through Fourth, in order to carry out congressional intent. *See Transamerica Airlines*, 817 F.2d at 513. The question is how much intrusion into the bargaining process is proper under the mandate of those provisions. It is doubtful that Congress intended the federal courts to operate as the NLRB does under the detailed statutory prescriptions of the NLRA. The language of section 2, First through Fourth, is very general, leaving the impression that the federal courts' obligation is to oversee the broad structure of the process and prevent major deviations, not to be involved in particulars of the bargaining process.

Wings West relied heavily on *Williams*, in which the Supreme Court faced a factual situation very similar to this and declined to step into the bargaining process. In *Williams*, no collective bargaining agreement existed and a union had been recently certified. The new union had requested a conference to negotiate for an initial agreement which would include the accounting for tips. De-

spite this fact, the employer unilaterally changed how employees would account for their tips. The Court concluded:

> Because the carrier was, by the [Railway Labor] Act, placed under the duty to exert every effort to make collective agreements it does not follow that, pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the *Jacksonville* case, the Railway Labor Act dealt with collective bargaining agreements only, and not within the employment of individuals.

Williams, 315 U.S. at 402. Hence, in *Williams*, the carrier was permitted to make unilateral changes in rates of pay, rules or working conditions.

The Supreme Court, in *Chicago & N.W. Ry.*, distinguished *Williams* and enjoined a strike in order to enforce the duty to bargain as mandated by section 2, First. In that case, the parties had exhausted the formal procedures of the RLA and the union threatened to strike. The Court held that Congress "intended to enforcement of § 2 First to be overseen by appropriate judicial means," and enjoined the strike. *Chicago & N.W. Ry.*, 402 U.S. at 581. The majority opinion drew a careful line in this regard. The majority found that an injunction under section 2, First, was proper to prevent a strike when it was

> the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements . . . .

Id. at 583. The dissenting opinion, written by Justice Brendan, and joined by Justices Black, Douglas, and White, emphasized the concern of those Justices that this was undue interference with the bargaining process.

The majority opinion reconciled this concern, emphasizing that only in rare occasions should the court interfere:

"[T]he policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *Id.* at 582 (citation omitted).

The D.C. Circuit, in *International Ass'n of Machinists v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), *amended*, 848 F.2d 232 (per curiam), *cert. denied*, 109 S. Ct. 62 (1988), addressed a situation similar to the one before us wherein the union had been certified by the National Mediation Board, and the district judge had ordered the carrier to commence bargaining and enjoined prospective unilateral changes in the working conditions. The carrier appealed and contended that the injunction could not properly be entered by the district court. The circuit court noted that the issue fell within the direct proscriptions of *Williams* but discerned the weakening of that strict proscription in the holding of the Court in *Chicago & N.W. Ry.*

The D.C. Circuit opinion stated:

> [T]he *Williams* case holding, though weakened, is not dead. . . . The independent duty found by the Court under Section 2, First, in the *Chicago and North Western* case is a limited one. The Court expressly held that the injunctive remedy would be available only "where a strike injunction is the only practical, effective means of enforcing the command of § 2 First." Plainly, the same restrictive test should apply in enjoining self-help by management.

Trans World Airlines, 839 F.2d at 814 (citation omitted). The D.C. Circuit went on to point out that in *Chicago & N.W. Ry.* all of the procedures for negotiations, mediation, and the period for cooling off had been attempted and failed, and a strike was imminent before resort was had to the injunctive measure. Here, as in the D.C. Circuit case, no steps toward bargaining, mediation, or the

other steps provided in the Act to assist the bargaining process had been undertaken. We agree with the D.C. Circuit that the interjection of the federal courts in the bargaining process is not authorized by section 2, First, as interpreted by *Williams* and *Chicago & N.W. Ry.* We only differ with the D.C. Circuit in that we do not conclude that this is a jurisdictional ruling. Our view is that jurisdiction exists to enforce section 2, First through Fourth, but that the prerequisites for stating a claim under the authority of *Chicago & N.W. Ry.* do not exist under the facts of this case where there has been no negotiation process instituted at all.

V. *Conclusion*

The district court had jurisdiction under section 2, First through Fourth, but the complaint fails to state a claim for relief.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-88-3487-FMS

THE REGIONAL AIRLINE PILOT ASSOCIATION and JAMES BISHOP,
Plaintiff (s),

vs.

WINGS WEST AIRLINES, INC., dba AMERICAN EAGLE,
Defendant (s).

ORDER

[Filed Dec. 21, 1988]

THIS MATTER came on regularly for a hearing on December 14, 1988 at 10:00 a.m. on Wings West Airlines, Inc. motion to dismiss the Regional Airline Pilot Association and James Bishop's complaint. The plaintiffs have also filed a motion to amend their complaint, and a request for injunctive relief.

The plaintiffs' motion to file an amended complaint is hereby GRANTED. Fed. R. Civ. P. 15(a) ("leave shall be freely given when justice so requires").

However, reviewing the amended complaint on its merits, this Court finds that the National Mediation Board has exclusive jurisdiction over the dispute in that this is a 'minor dispute' relating to the interpretation or application of the existing collective bargaining agreement. *See IAM v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). Accordingly, this Court has no subject

matter jurisdiction over the dispute, and the motion to dismiss the action is hereby GRANTED. Plaintiff's motion for injunctive relief is hereby DENIED.

SO ORDERED.

DATED: December 20, 1988

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-88-3487-FMS

THE REGIONAL AIRLINE PILOT ASSOCIATION and
JAMES BISHOP,
Plaintiff (s),

vs.

WINGS WEST AIRLINES, INC., dba AMERICAN EAGLE,
Defendant (s).

ORDER DENYING MOTION TO VACATE

[Filed Mar. 3, 1989]

This matter is before the Court on plaintiff's motion to vacate an Order and Judgment entered by this Court on December 21, 1988. The plaintiff claims this Court erroneously determined that the dispute between the plaintiffs and the defendants was a minor dispute under the Railway Labor Act.[1]

The Railway Labor Act, 45 U.S.C. ch. 8, sections 151 *et seq.*, as originally enacted, created procedures and Federal administrative machinery to facilitate the selection of bargaining representation and the reaching of agreements. *See generally, Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946).

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[1] The plaintiff also requests that this Court permit the First Amended Complaint to be filed. The Court's previous Order granted the plaintiff leave to amend the First Amended Complaint, and specifically considered the First Amended Complaint in reaching its ruling.

The National Mediation Board's (formerly the Board of Mediation) purpose is to hear and determine initially employer-employee disputes over the interpretation and applicability of existing contracts. Where the position of one or both of the parties is expressly or arguably predicated on the terms of an agreement, as illuminated by long-standing practices, the merits of each sides position is a minor dispute. *See Switchman's Union v. South Pacific Co.*, 398 F.2d 443 (9th Cir. 1968).

In this case, there is no collective bargaining agreement in place, nor has there ever been. Therefore, both sides argue that this cannot be a minor dispute. We disagree. The plaintiff argued strenuously and vociferiously at the hearing that this matter involves two issues: 1) Did Wings West interfere with the pilots' right to representation prior to certification?; 2) Are the pilots entitled to the continuation, post-certification, of certain benefits previously conferred upon them through long-standing practices, i.e., "jumpseat" privileges?

The fact that the prior agreement between the pilots and employer was not part of a formal collective bargaining agreement should not change the analysis of the problem, or the way in which it fits into the scope and intent of the Act. While this may not be "a minor dispute" by law, it is certainly one in fact. *See O'Donnell v. Wein Air Alaska*, 551 F.2d 1141, 1147 (9th Cir. 1977); *Railway Labor Executives Ass'n v. Atchinson, T. & S.F. Ry. Co.*, 430 F.2d 994, 997 (1970). If controlling formal documents do not unambiguously answer the dispute, Congress intended that an Adjustment Board shall be the tribunal of first resort. *Id.*

Notwithstanding plaintiff's attempt to characterize the facts herein as a tort action in violation of a statutory duty, the provisions of the Railway Labor Act "relate to matters of substance, not form", and if

> "the dispute grows out of the employment relationship and, in the final analysis, involves an attempt

> to impose a right which is incident to that relationship, the statutory form is the Adjustment Board, absent a clear expression of legislative policy to the contrary."

Railway Labor Execs., 430 F.2d at 997.

In this matter, the issues of interference with representational rights and the interpretation and effect, if any, of long-standing practices between employer and employees are inextricably bound together. Neither is a "major dispute", either standing alone or in combination. Therefore, whether this Court calls them "minor" or "representational" is putting form over substance. However labeled, this is the type of dispute intended to be resolved by a mediation board, absent any intrusion by the courts. Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that the plaintiff's motion to vacate this Court's Order and Judgment of December 21, 1988 is DENIED.

DATED: March 3, 1989

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15335
D.C. No. CV-88-3487-FMS

THE REGIONAL AIRLINE PILOT ASSOCIATION;
JAMES BISHOP,
Plaintiffs-Appellants,

v.

WINGS WEST AIRLINES, INC., dba AMERICAN EAGLE,
Defendant-Appellee.

ORDER

[Filed Jan. 9, 1991]

Before: HUG and SCHROEDER, Circuit Judges, and von der HEYDT*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Schroeder have voted to reject the suggestion for a rehearing en banc, and Judge von der Heydt recommends rejection of the suggestion.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* The Honorable James A. von der Heydt, Senior United States District Judge for the District of Alaska, sitting by designation.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-726

REGIONAL AIRLINE PILOT ASSOCIATION and
JAMES BISHOP,
Petitioners

v.

WINGS WEST AIRLINES, INC., dba AMERICAN EAGLE

ORDER

[Filed Apr. 2, 1991]

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 9, 1991.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 27th day of March, 1991.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees desig-

nated and authorized in acordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.